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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1113

NORMAND SMITH and NANCY L. SMITH, and HARRY NEUMANN,

Petitioners,

v.

GOVERNMENT OF THE VIRGIN ISLANDS, HARVEY ALUMINUM (INCORPORATED), and HARVEY ALUMINA, VIRGIN ISLANDS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCISCO CORNEIRO,
Attorney General of the Virgin Islands,
Attorney for Respondent, Government of the Virgin Islands,
Government House, Charlotte Amalie,
Saint Thomas, Virgin Islands.

JAMES E. NICKERSON,
Attorney for Respondents, Harvey Aluminum and Harvey Alumina Virgin Islands,
40 Wall Street, New York 5, New York.

PHILIP J. DUNLAY,
JOHN L. HAWKINS,
of Counsel.

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The Decisions of the Courts Below

The subject legislation (Act 814) concerns solely the economic needs of the undeveloped insular economy of the Virgin Islands and the economic projects designed as a step forward to meet those needs.

By their complaints in their taxpayer actions, petitioners asked that that legislation be declared invalid solely under the due process and equal protection clauses in the Revised Organic Act for the Virgin Islands.*

Respondents made two motions in the District Court, namely (1) under Rule 12(b) to dismiss the

* 48 U. S. C. § 1561.

actions on the ground that petitioners had no standing to maintain their alleged taxpayer actions and (2) under Rule 56(b) for summary judgment that the subject legislation was valid.

By its decision the District Court granted respondents' motion under Rule 12(b) and further found that if petitioners had had a standing to sue, the court would, then, have had no choice but to grant respondents' motion for summary judgment.

By its decision, the Court of Appeals found that the continuance of this litigation would constitute a judicial trespass on the legislative function and held that respondents were entitled to summary judgment on the merits.

Petitioners' petition for a rehearing was denied by the Court of Appeals, 7 judges present.

Questions Presented

1. Are the "questions presented" by petitioners anything more than rhetorical questions, divorced from the terms and circumstances of the case?

2. Is there any reason for a review by this Court of the decision of the Court of Appeals that there is no basis, on the facts in this case, for the judiciary to reject the findings of the Legislature of the Virgin Islands, i.e.:

> (a) that the Islands have an undeveloped economy which needed to be relieved from dependence on tourism and required a higher quality of employment;
>
> (b) that it is in the public interest to develop that economy by promoting the establishment of large scale industrial operations and related facil-

ities, including public facilities for handling ocean-going commerce;

(c) that it is vital to the prosperity of the entire region to start the promotion of such economic goals through the specific means (i.e. the Agreement with Harvey) adopted in the subject legislation; or

(d) in short, that the subject legislation is for the public purpose of improving the economic welfare of the people of the Virgin Islands?

3. Do petitioner-taxpayers have, as regards an action to challenge the validity of the subject legislation, the required interest to create the justiciable case or controversy necessary to invoke the jurisdiction of this Court?

Statement

Petitioners' selected version of the facts does not contain the facts material to the consideration of the questions presented.

The Virgin Islands is an undeveloped economic area which is, insular, both geographically and in the sense of being out of the stream of our national economic life. Its economy is dependent on tourism (A22a; RA20b)*. The median income of families and unrelated individuals is only about $1,600; and more than 25% of them have an annual income of less than $700 (RA25b). The median school years completed is not over 7.5 years (RA26b). The federal government designated the Virgin Islands as a redevelopment area (26 Fed. Reg. 9939, Oct. 1961).

*These and similar references are to petitioners' Appendix ("A"), and to respondents' Appendix ("RA"), in the court below which have been filed with this Court.

The Legislature made determinations and findings of fact as to what were the essential needs of the economy. It did so in the subject Act itself (A22a-23a). It did so when it ratified and adopted the governmental findings contained in the Agreement with Harvey (A25a-27a). In addition, a part of the legislative record consisted of the findings made by the government as a result of its studies and investigations (RA18b-23b).

Those legislative determinations and findings were, in brief, that it was essential to the general economic welfare that dependence on tourism be relieved through the establishment of large scale industrial operations and related facilities including public facilities for handling oceangoing commerce.

So the subject legislation was for an obvious public purpose, i.e., to advance the general economic welfare of an undeveloped economy.

The means the Legislature adopted as a first step in effectuating that public purpose was the Agreement with Harvey (A25a-59a). By it the Legislature sought basically to induce Harvey:

> (1) to establish at an anticipated cost of $25,000,000 an alumina plant with related facilities including its own water supply facilities and thereafter to go forward with contemplated future industrial expansions; and
>
> (2) to create a public deep water channel with a turn-about area providing access not only to the alumina plant but also to public land for the establishment of a public pier and related public facilities to handle oceangoing commerce for the public.

These actions were instituted after Harvey had designed, with the approval of the government, the public

deep water channel and after Harvey had spent more than $1,000,000 going forward with the other economic projects authorized by the subject legislation (RA17b-18b).

To induce Harvey to assume the risks of going to the Virgin Islands and pioneering in these industrial and commercial developments, the Legislature found that it was necessary to provide some incentives (RA 26a, third "Whereas" clause). States all over our country are competing with one another offering incentives to encourage the establishment of industrial operations within their respective areas (RA27b-31b). The facilities and advantages which such states have to attract the location of industrial establishments are obviously not found in such an undeveloped insular economy as the Virgin Islands.

Petitioners characterize the inducements which the Legislature offered Harvey as nothing but "gratuitous grants" of "treasure" owned by the Virgin Islands. But this is what the Legislature approved:

First, it was agreed to convey to Harvey such interest as the Virgin Islands had in about 700 acres of land, subject, however, to the approval of the federal government. For that land had been acquired by the federal government; and under federal law its disposition and use was subject to federal determination. (RA15b; RA2b-5b)

Such restricted title as the Virgin Islands acquired from the federal government did not cost the Virgin Islands or its taxpayers one cent. That land had never produced any revenue for the Virgin Islands—during the 14 years it held such restricted title—in excess of $1,730 in any year. And, in connection with obtaining

the approval of the federal government, Harvey agreed to pay to the Virgin Islands $2,500 annually for 16 years. (RA15b; RA14b)

Second, it was agreed to convey to Harvey a 500 acre salt water marshland (the Lagoon). This marshland was the only place through which the public deep water channel and related public facilities could be developed (A53a, 55a).

Here again this marshland did not cost the Virgin Islands or its taxpayers one cent. It had never contributed any revenue for the Virgin Islands. The government obtained title to the Lagoon from a private person with $6,100 supplied by Harvey. So Harvey actually purchased this Lagoon with its own money. (RA14b; RA16b)

Third, it was agreed to give Harvey certain rights to obtain reimbursement for the cost of developing the public deep water channel and turn-about area. But the government did not assume any general obligation therefor. It merely agreed to use its best efforts to obligate the federal so-called matching funds (payable to the Virgin Islands by the federal government) to make such reimbursement. (A57a-58a)

But the use of such funds by the Virgin Islands (for such or any other purpose) is by federal law subject to the approval of the federal government, i.e., the President of the United States or his designee.*

So Harvey was given the right if such approval should not be given to obtain such reimbursement by way of tax exemptions, as regards the taxable revenue produced by its business operations in the Virgin Islands (A58a). In other words, Harvey's right to get such reimbursement is a self-liquidating one.

* Section 7652(b) of the Internal Revenue Code of 1954.

And thus Harvey was required to assume the risk of getting no reimbursement even for the development of these public facilities.

Fourth, it was agreed to give Harvey during a period of 16 years certain tax exemptions; but these exemptions do not apply to 25% of the applicable income tax (A38a-41a). Those exemptions do not eliminate any revenue previously received by the government, since the government has not been receiving any tax revenue at all from the sources to which the exemptions are applicable.

Similar exemptions are made available in the subject legislation for those who establish comparable industrial operations in the Virgin Islands (A25a).

THE REASONS WHY THE PETITION SHOULD BE DENIED

(1)

None of the "questions presented" by petitioners amount to anything more than rhetorical questions, divorced from the terms and circumstances of the case which involves the particular needs of the undeveloped insular economy of the Virgin Islands.

Those "questions" amount to nothing more than whether a gift of public money for a private purpose is invalid or whether a private purpose is a public purpose or whether the gratuitous grant of a special privilege for a private purpose is invalid. Such questions are straw-men questions which answer themselves.

The "reasons" petitioners enumerate for granting the writ constitute, on their face, no reason at all for a review of the questions the present.

For example, they offer their opinion that the decision of the Court of Appeals is of grave concern to the people of the Virgin Islands. But these three peti-

tioners—two of whom pay federal income taxes in Connecticut (A1a)—do not speak for the people of the Virgin Islands. Those people are represented by their legislators; and the subject legislation was enacted without one dissenting vote. Perhaps some persons would like the Virgin Islands to be kept as an exclusive preserve for winter vacationers, having a supply of cheap-wage domestic servants.

Again, petitioners assert that the procedural aspects of this case, e.g., the granting of summary judgment, have been objectionable. But this matter of procedure is not even one of the questions petitioners present for review. Moreover, petitioners' representations that they have not had their full day in court are demonstrably false as shown by the indisputable facts as to what has taken place in these proceedings from the beginning, including their own briefs submitted to the District Court and to the Court of Appeals.*

(2)

There is no reason at all for a review of the decision of the Court of Appeals.

After reviewing the entire record, including the legislative findings as to the particular needs of the undeveloped insular economy of the Virgin Islands, the Court of Appeals stated the essence of its holding when it found that "It would constitute a judicial trespass on the legislative function to proceed further with this litigation."

We believe it is elementary by now that the judiciary is being asked to commit a trespass upon the legislative function when it is asked to reject the deter-

* See respondents' "Answer in Opposition To Petition For Rehearing", which was reviewed by the Court of Appeals, having before it the full record of all the proceedings, including the briefs in the District Court.

minations and judgment of the legislature as to the needs of an undeveloped economy, as to the economic projects to meet those needs and as to the quantum of governmental assistance required to achieve those economic goals.*

Unless it is clearly established that there is no rational basis, at all, for such determinations and judgment, the matter is solely for the Legislature. And petitioners do not even present the question for review by this Court as to whether there is any rational basis at all for such determinations and judgment on the part of the Legislature of the Virgin Islands.

For, as found by the Court of Appeals, petitioners' claims amount to "nothing more and nothing less than the assertion of debatable issues concerning which they entertain one view and the Legislature another, and as to which the Legislature has the last word."

Petitioners seem to be suggesting that legislation —which otherwise clearly provides for a public purpose for the Virgin Islands—is converted, as a matter of law, into legislation for a private purpose for the benefit of a private corporation, merely because the achievement of that purpose involves the giving of some incentives by the Virgin Islands to private industry.

The basic principles which repudiate petitioners' position have been repeatedly laid down by this Court**

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* "With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire." *Green v. Frazier*, 253 U.S. 233, at 240 (1920).

** *Barbier v. Connolly*, 113 U.S. 27 (1885); *Nebbia v. New York*, 291 U.S. 502 (1934); *Berman v. Parker*, 348 U.S. 26 (1954); *Green v. Frazier*, 253 U.S. 233 (1920); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

and have become by now elementary. And those principles have been repeatedly applied in cases involving legislation which authorized financial assistance to private industry where there was far less need to improve an undeveloped economy through industrialization than has been found by the legislature to exist in the undeveloped insular economy of the Virgin Islands.*

Petitioners cite two cases decided by this Court more than 75 years ago.** There was no legislative finding as to the municipalities involved in those cases that the nature of their economies was such that the public interest required industrialization. Those cases involved nothing comparable to the legislative findings as to the needs of the undeveloped insular economy of the Virgin Islands.

So there is nothing to petitioners' claim that the subject legislation was not for a public purpose; and that is the sole basis for all their arguments—including their reference to the equal protection clause and to 24 Stat. 170.† As the Court of Appeals found: "Appellants do not dispute that if there was 'public need or purpose' in the enactment of Act 814, and the Agreements and undertakings, they have not made out a case."

That is why, when the Court of Appeals found that there was no basis for rejecting the legislative determi-

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* *Albritton* v. *City of Winona*, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938); *Cannata* v. *City of New York*, 11 N.Y. 2d 210, 182 N.E. 2d 395, *appeal dismissed*, 371 U. S. 4 (1962); *City of Frostburg* v. *Jenkins*, 215 Md. 9, 136 A. 2d 852 (1957); *McConnell* v. *City of Lebanon*, 203 Tenn. 498, 314 S. W. 2d 12 (1958); *In re Opinion of the Justices*, 177 A. 2d 205 (Sup. Ct. Del. 1962).

** *Citizens Saving and Loan Association* v. *Topeka*, 20 Wall. 655 (1874); *Cole* v. *La Grange*, 113 U. S. 1 (1885).

† 48 U.S.C. § 1471.

nation with respect to the public purpose involved, it had no occasion to deal specifically with the provisions of 24 Stat. 170.

Petitioners seem to imply that the Legislature of the Virgin Islands could not move forward with its economic goal of industrial development unless it induced *simultaneously* the establishment in the Virgin Islands of large-scale industrial operations by some unnamed *number* of industrial corporations.

The subject legislation provided everything it reasonably could for additional comparable developments by authorizing the Government to extend similar benefits to induce the establishment of other comparable industries (A25a).

(3)

Moreover, petitioner taxpayers do not have the required interest to create a justiciable case or controversy necessary to invoke the jurisdiction of this Court.

In *Doremus* v. *Board of Education*, 342 U. S. 429 (1952) this Court dismissed an appeal of a taxpayer, seeking to have a statute of New Jersey declared invalid, on the ground that the taxpayer had failed to show the required justiciable controversy to invoke the jurisdiction of this Court, saying (p. 433):

> "Whether such facts amount to a justiciable case or controversy is decisive of our jurisdiction."

The relevant tests of whether a justiciable controversy exists in a taxpayer's action, such as we have here, were declared in *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), reaffirmed in *Alabama Power Co.*

v. *Ickes*, 302 U. S. 464 (1938) and amplified and applied in *Doremus* v. *Board of Education, supra.*

The necessary justiciable controversy requires a showing by the taxpayer that he "'has sustained or is immediately in danger of sustaining some direct injury'." A taxpayer can meet the test only when he has "a good-faith pocketbook action". (*Doremus* v. *Board of Education, supra,* p. 434.)

Even if a taxpayer could show that he will suffer in some indefinite way in common with people generally, that is not enough. For in that area the matter is for the legislative branch and not for the judiciary. That is why the taxpayer must show financial injury which is direct and also particular in that it differentiates him from the community in general. (*Doremus* v. *Board of Education, supra,* pp. 434-435.)

These taxpayer actions are far removed from any "good-faith pocketbook action". Petitioners did not contribute so much as one cent to the Lagoon which is involved. The title to that property was paid for by Harvey itself.

Petitioners did not contribute so much as one cent to the land. It was acquired by the federal government without one cent of contribution from the Virgin Islands taxpayers. And the use and disposition of that land pursuant to the subject legislation was only possible, under federal law, by virtue of the determination and approval of the federal government.

Petitioners will not contribute so much as one cent to the federal so-called matching funds, which might be used in the future provided the federal government approves, as is required by federal law. Those funds

will all be acquired from the federal government without one cent of contribution from the Virgin Islands taxpayers.

Thus, although no claim has been made against the federal government, these taxpayer actions are directed in substance to the use and disposition of federal property.

To the extent petitioners do have an interest in the subject legislation, it is an interest in common with the community and people generally. The subject matter of the legislation concerns exclusively economic needs and economic projects designed for the promotion of the general welfare.

CONCLUSION

The petition should be denied.

Respectfully submitted,

FRANCISCO CORNEIRO
Attorney General of the Virgin Islands
Attorney for Respondent, Government of the Virgin Islands

JAMES E. NICKERSON,
Attorney for Respondents Harvey Aluminum and Harvey Alumina Virgin Islands.

PHILIP J. DUNLAY
JOHN L. HAWKINS
Of Counsel